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No. 92-1189

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1992

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COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
*Petitioner,*

v.

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE ADJUNCT SCIENCE AND EDUCATION ASSOCIATION AND PROGRAM IN SUPPORT OF PETITIONER

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The Adjunct Science and Education Association and Program moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Counsel for the petitioner has consented to the filing of this brief; counsel for the respondents have refused consent.

The Adjunct Science and Education Association and Program was created under the auspices of Columbus-America Discovery Group in January 1989 to undertake scientific and educational endeavors as part of the exploration of the shipwreck site of the *S.S. Central America*. The program involves more than one hundred researchers and scientists from approximately 65 institutions, includ-

ing academic institutions, museums, historical societies, governmental agencies, research laboratories and oceanographic institutions. The researchers and scientists participating in the Adjunct Science and Education Association and Program have associated for the purpose of deep-sea study in conjunction with the *S.S. Central America* Project. The program was initiated to ensure that the rare opportunity to gain new knowledge of deep ocean features, biota and other processes at the site of the *S.S. Central America* was not lost. Further, the science program seeks to maintain archives of samples, photographs, and other technical data for use by the scientific community and for translation to educational and public interest documents.

Because of the nature of this project, and the opportunity for ocean research that it presents, a coordinated science program is needed to ensure that this opportunity to gain new knowledge of deep ocean features is not lost. The vast seas of our world remain essentially unknown. Advances in marine technology, however, have made deep-sea exploration and research feasible, and the oceans' abundant resources—historical, biological, medical and chemical—hold great promise for all.

The incentives provided by the certainty and predictability of the maritime law of finds—which was effectively destroyed by the decision below—encourage multidisciplinary efforts involving teams of chemists, biologists, oceanographers and historians to discover the extraordinary deep sea community of life forms, to recover a lost part of America's heritage, to advance scientific progress, and to provide educational programs. The Fourth Circuit's decision could well herald the end of responsible exploration and recovery of long-lost shipwrecks and may irreversibly damage the vast potential of scientific information available from these finds.

Dividing shipwreck sites into a multiplicity of interests, according to ancient claims of ownership, will dis-

rupt their scientific and historic integrity and unity. Furthermore, fractured ownership interests will remove important scientific infomation from its context, thus precluding the full realization of the potential value of shipwrecks as unique scientific laboratories.

Without the responsible handling and development of shipwreck sites, the multidisciplinary scientific effort required to gain valuable information from the deep sea cannot occur. The Fourth Circuit's decision threatens to halt all future multidisciplinary efforts that utilize the wealth of information available at shipwreck sites. If such efforts are thwarted by the decision below, we could lose a tremendous opportunity to expand our scientific knowledge.

For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the petitioner.

Respectfully submitted,

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## QUESTION PRESENTED

May admiralty courts continue to infer abandonment of long-lost shipwrecks from the passage of many decades, nonuse, and all other relevant facts and circumstances, and accordingly award ownership of a shipwreck to those who discover, recover and conserve it under the law of finds; or must courts award title to purported insurers and their successors who claim ownership of a shipwreck under the law of salvage on grounds that abandonment can never be found absent clear and convincing evidence that the purported owners expressly renounced title?

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## BRIEF AMICUS CURIAE OF THE ADJUNCT SCIENCE AND EDUCATION ASSOCIATION AND PROGRAM IN SUPPORT OF PETITIONER

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### INTEREST OF AMICUS CURIAE

The Adjunct Science and Education Association and Program was created under the auspices of Columbus-America Discovery Group in January 1989 to undertake scientific and educational endeavors as part of the exploration of the shipwreck site of the *S.S. Central America*. The program involves more than one hundred researchers and scientists from approximately 65 institutions, including academic institutions, museums, historical societies, governmental agencies, research laboratories and oceanographic institutions. The researchers and scientists participating in the Adjunct Science and Education Association and Program have associated for the purpose of deep-sea study in conjunction with the *S.S. Central America*

Project.* The program was initiated to ensure that the rare opportunity to gain new knowledge of deep ocean features, biota and other processes at the site of the *S.S. Central America* was not lost. Further, the science program seeks to maintain archives of samples, photographs, and other technical data for use by the scientific community and for translation to educational and public interest documents.

The association approaches the study of the *S.S. Central America* as a multidisciplinary effort, providing opportunities for qualified researchers in a variety of fields to conduct deep-sea scientific investigation. Because of the nature of this project, and the opportunity for ocean re-

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* Participants in the Adjunct Science and Education Program have studied a variety of subjects in connection with the *S.S. Central America* Project, including 1) pteropods; 2) deep-sea benthic communities; 3) deep-sea sharks & fish communities; 4) deep-sea fishes & fisheries; 5) marine invertebrates; 6) biochemistry of deep-sea sponges; 7) biology of deep-sea sponges; 8) sea anemones; 9) marine algae; 10) hexactinellid sponges; 11) microorganims; 12) marine fungi; 13) marine mammals; 14) deep-sea crustaceans; 15) greenland sharks; 16) fossil glass sponges; 17) actinomycets; 18) crinoids; 19) habitat assessment-fisheries; 20) deep-sea antipharians; 21) marine microbiology; 22) deep-sea invertebrates; 23) aquatic plants; 24) biogeography; 25) marine education; 26) wood-boring mollusks; 27) cephalopods; 28) galatheid crabs; 29) deep-sea mollusks; 30) design of deep-sea biological experiments; 31) history; 32) benthic microbiology; 33) bryozoans; 34) steamship construction history; 35) steamship engineworks; 36) pharmacological screening of sponge tissues; 37) history of the *S.S. Central America* & Commander Herndon; 38) mineralogy of gold nuggets; 39) deep-sea methane; 40) deep-sea sediment; 41) ocean & sediment dynamics; 42) hurricane metcorology; 43) x-ray analysis of wood from shipwrecks; 44) geology & oceanography of the North Atlantic Ocean; 45) exhibit design; 46) undersea archaeology; 47) deep-sea corrosion; 48) undersea photography; 49) metals analysis; 50) wood analysis; 51) deep-sea rusticles; 52) formation of rusticles; 53) deep-sea sediment imprints; 54) medicinal chemicals in marine life; 55) logistics; 56) diaton microphotographs; 57) mathematical search theory; 58) history of the gold rush period; and 59) bathymetric data.

search that it presents, a coordinated science program is needed to maximize this opportunity to gain new knowledge of deep ocean features. However, if the decision below is allowed to stand, it will serve as a constructive barrier for groups, such as the Adjunct Science and Education Association and Program, wishing to study shipwrecks. Thus, the *amicus* respectfully requests that the Court grant certiorari in this case.

## THE PETITION FOR CERTIORARI SHOULD BE GRANTED

### I. THE ISSUE PRESENTED BY THIS CASE HOLDS WIDESPREAD SIGNIFICANCE FOR NUMEROUS AREAS OF HUMAN ENDEAVOR

The vast seas covering our world remain essentially unknown. Advances in marine technology, however, have made deep-sea exploration and research feasible, and the oceans' abundant resources—historical, biological, medical and chemical—hold great promise for all. The Court's decision to grant certiorari in this case will have a direct impact on whether and when that promise is fulfilled.

#### A. To Properly Discover, Recover, and Conserve Long-Lost Shipwrecks Requires a Multidisciplinary Effort, Bringing Together an Array of Natural and Social Sciences and the Arts

Due to the vast and diverse potential of ocean exploration, a study of shipwrecks must be multidisciplinary: ocean engineering, marine biology, navigation, probability analysis and mathematics, oceanography—as well as a host of other natural sciences—play an important role in the responsible exploration of shipwrecks, and provide a unique opportunity for development in each of these disciplines.

Dividing shipwreck sites into a multiplicity of interests, according to ancient claims of ownership, will disrupt their scientific and historic integrity and unity.

Fractured ownership interests will remove important scientific information from its context and will preclude the full realization of the potential value of shipwrecks as unique scientific laboratories.

### B. The Discovery, Recovery and Conservation of Long-Lost Shipwrecks Present Enormous Opportunities in Medicine, Food Production, and Energy Development

#### 1. *The Multidisciplinary Study of Shipwreck Sites Provides a Unique Opportunity For New Advances in Biomedical Research*

Due to the fact that half of our drugs come from living things and because the ocean is home to about 80 percent of all plants and animals, the sea may well be a storehouse of many useful medications. Certain marine animals, such as sponges and lunicates, are rarely eaten because their tissue contains noxious chemicals that ward off predators. The protective chemicals produced by the sponges make them excellent candidates for biomedical research. Charles Herdendorf, *Discovery in an Alien Environment*, American History Illustrated, Mar.-Apr. 1991, at 66, 71 [hereinafter Herdendorf, *Discovery*], Deep-sea animals have been shown to have a number of disease fighting capabilities, including: (1) anti-viral, (2) anti-fungal, (3) anti-tumor (cancer ameliorating drugs), (4) anti-inflammatory (arthritis drugs), and (5) immunomodulatory (drugs that stimulate or suppress immune response). One of the most exciting discoveries from the exploration of the ocean might be a new drug that will benefit all of us. Normally, it would be very difficult for scientists to obtain specimens from great ocean depths, but new technology developed by ocean explorers has the capacity for collecting and securely storing samples that has greatly simplified this task.

### 2. *Responsible Recovery and Conservation of Long-Lost Shipwrecks Will Continue to Expand Our Scientific Knowledge of the Deep-Sea Floor*

Along with the potential for progress in the area of biomedical research, the study of shipwreck sites also affords research opportunities in the areas of bioscience, physical and chemical studies and historical archaeology. For example, at the *S.S. Central America* site, these experiments include (1) deterioration of metal objects, (2) microbiological studies, (3) wood degradation, (4) indexing abyssal fauna, (5) concentration and composition of the food chain, (6) sedimentation studies, (7) biomedical and biochemical research, and (8) development of historical information.

When Columbus-America Discovery Group discovered the wreck of the *S.S. Central America*, it recognized the unique opportunities the wrecksite provided for scientific exploration. To realize the full potential of the *S.S. Central America*, Columbus-America Discovery Group, in conjunction with the Adjunct Science Program, placed a variety of experiments at the shipwreck site. Herdendorf, *Discovery*, at 71. This one extraordinary research effort has led to the discovery of eleven new species of sea life, some of which are being studied for antigens in the fight against cancer and other diseases, and others of which are being studied to assist in increasing our food production. *Id.* The Adjunct Science Program has also had the rare opportunity to observe the feeding, courtship and mating behavior of many deep-sea species that have rarely or never been filmed before. *Id.* The Program has also observed a Greenland shark at the shipwreck site, about one thousand miles south and more than three thousand feet deeper than any earlier recording. *Id.* Because less than 1% of the deep-sea floor has been explored, all of these observations are important contributions to our scientific knowledge.

Without the responsible handling and development of shipwreck sites, as exemplified by Columbus-America Dis-

covery Group, the multidisciplinary scientific effort required to gain valuable information from the deep-sea cannot occur.[2] The Fourth Circuit's decision threatens to halt all future multidisciplinary efforts to utilize the wealth of information available at shipwreck sites. If such efforts are thwarted by the decision below, we could lose a special opportunity to expand our scientific knowledge.

## II. THE OPINION BELOW IS CONTRARY TO THE LAW AND DETRACTS FROM THE MULTIDISCIPLINARY OPPORTUNITIES OFFERED BY RESPONSIBLE SHIPWRECK DISCOVERY, RECOVERY AND CONSERVATION

### A. The Opinion Essentially Obliterates the Law of Finds According Title to Finders Who Reduce Long-Lost Property to Possession

Maritime law recognizes two theories under which persons are given incentives to recover shipwrecks. The law of commercial salvage is traditionally applied to ships that have recently been lost or are in imminent risk of loss through a marine peril. Under the law of salvage, the salvor is compensated for its services through the enforcement of a maritime lien on the property recovered. Salvage law is usually applied in circumstances where the owners of the ship and cargo are known or easily determined.

In the case of long-lost shipwrecks, however, the application of commercial salvage concepts is impractical because the determination of ownership of such wrecks is

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[2] For instance, Columbus-America Discovery Group has recovered artifacts from the *S.S. Central America* in a meticulous manner,

> [b]ecause each artifact has to be carefully catalogued, photographed, and preserved . . . . The team's primary archaeological goal has been to establish an adequate record with a minimum amount of disturbance to the wreck, allowing for future opportunities for detailed study and interpretation.

Herdendorf, *Discovery*, at 71.

made speculative, if not impossible, by the passage of time, loss or destruction of records, absence of witnesses, and the often destructive effects of the harsh marine environment on the wreck and its contents. Therefore, the maritime law of finds has become the overwhelming law of the land for adjudicating rights to long-lost wrecks. *See, e.g., Martha's Vineyard Scuba Headquarters v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1064-65 (1st Cir. 1987); *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985); *see also Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978) (noting that the "disposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths.")

In applying the law of finds, the admiralty courts have established the threshold requirement that the finder act in good faith to protect the scientific, historic and archaeological values of the shipwreck. *Columbus-America Discovery Group, Inc. v. Unidentified and Abandoned Sailing Vessel*, 1989 AMC 1955 (E.D. Va. 1989). By contrast, a court has no power to impose such a requirement on an alleged owner. The alleged owner, acting either directly or through contract salvage, may do whatever it desires with its property, without regard to the destruction of the scientific and historic values of shipwrecks. Indeed, insurers typically handle salvage on a "no cure, no pay" basis; salvors are compensated solely for salving the insurers' alleged property—not for protecting the interests of others. *See Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 713 n.11 (1982). *See also The Elfrida*, 172 U.S. 186, 192 (1898) (recognizing an early form of "no cure, no pay" contract); *Sea Lift, Inc. v. Refinadora Costarricense de Petroleo, S.A.*, 792 F.2d 989, 992 (11th Cir. 1986) ("no cure, no pay" is "the most widely used salvage contract in the world"); *Alva Steamship Co. v. City of New York*, 616 F.2d 605, 610 (2nd Cir. 1980) ("no cure, no pay"

"is standard in the salvage trade"). Therefore, the application of the law of commercial salvage not only flies in the face of established maritime law, but it threatens to destroy the scientific and histroical value of shipwreck sites. Moreover, virtually all protective regulations of cultural property assume abandonment of the rights of prior owners. *See* Abandoned Shipwreck Act of 1987, 43 U.S.C. § 2101 *et seq.* (1988). Thus, the Fourth Circuit's decision emasculates the recent progress of both state and federal legislation implementing protection for long-lost and abandoned shipwrecks.

### B. The Fourth Circuit's Decision Undermines Certainty and Predictability Regarding Title to Items Found On the Seabed

The decision below, as a practical matter, makes it impossible to prove abandonment of and to quiet title to ocean resources. Applying the Fourth Circuit's decision, no factual showing of abandonment based on circumstantial evidence can ever be made. The court first notes that finds law should be applied "when . . . property has been abandoned by its previous owners." *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 974 F.2d 450, 461 (4th Cir. 1992). However, the court found that abandonment must be proved by "clear and convincing evidence," such as the express abandonment of property by the previous owner. *Id.* at 464. Thus, under the Fourth Circuit's test, no aabndonment can be found absent an express declaration renouncing title. The decision effectively invites claims of ownership, scores of years old, to cloud title to property found at sea, blighting the freedom of movement and discovery that are the very foundation of the international law of the sea.

By according a presumption of ageless vitality to purported ownership interests in long-lost shipwrecks, the Fourth Circuit's decision undermines the certainty and predictability previously accorded explorers who have

found, taken into possession, and conserved ancient items on the seabed. The incentives provided by the certainty and predictability of the maritime law of finds—which was effectively destroyed by the decision below—encourages multidisciplinary efforts involving teams of chemists, biologists, oceanographers, and historians to discover the extraordinary deep-sea community of life forms, to recover a lost part of America's heritage, to advance scientific progress and to provide educational programs.

### C. The Opinion Below Will Hamper Future Scientific Exploration of Long-Lost Shipwrecks and Will Foster the Destruction of Historical Information, as Well as the Loss of Scientific Knowledge

If the Fourth Circuit's decision is allowed to stand, it will not only threaten the future of scientific exploration, it will also threaten to destroy a valuable source of historical information. The preservation of historical information is important to America's cultural heritage and is recognized as our national public policy in the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.* (1988). Congress has declared that:

> [T]he preservation of [our] irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans.

16 U.S.C. § 470(b)(4). The Fourth Circuit's decision places in jeopardy a vast wealth of historical information that is often contained in shipwrecks. The study of historic shipwrecks gives historians a valuable insight into trade, shipboard life and the interaction between the Old and New Worlds in the exploration and settlement of this country. U.S. Congress, Office of Technology, *Technologies for Underwater Archaeology and Maritime Preservation—Background Paper*, OTA-BP-E-37, 8 (1987).

Often, a shipwreck site is identified by artifacts found on the wreck. In fact, Columbus-America Discovery Group

used artifacts, such as the ship's bell and period pottery, to confirm the identity of the shipwreck. Herdendorf, *Discovery*, at 70. The court of appeals' decision, however, discourages finders from investigating conditions, items and structures at the wrecksite that may link a particular recovered artifact with a particular crew member, shipper or pasenger. In effect, the finder of a shipwreck has a disincentive to develop historical information that might reveal invaluable information about our rich historical and cultural heritage.

A system that penalizes scientific and historical inquiry is wrong. If a finder develops evidence linking a particular long-lost item with a long-gone crew member, cargo interest or passenger, the finder may be penalized, under the court's holding, with a lawsuit by the descendants. The law should not support such a perverse result.

## CONCLUSION

The Fourth Circuit's decision could well herald the end of responsible exploration and recovery of long-lost shipwrecks and may irreversibly damage the vast potential of scientific information available from such shipwrecks.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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